(3)

No. 03-1338

Supreme Court, U.S.
FILED
APR 22 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SANTA BARBARA NEWS PRESS, et al.,

Petitioners,

v.

LEONARD M. ROSS,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEONARD M. ROSS
1011 ½ North Beverly Drive
Beverly Hills, California 90210
(310) 278-8193
Facsimile (310) 278-9677
Respondent

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 3

MISSTATEMENTS AND OMISSIONS OF FACT AND LAW IN PETITION 4

REASONS WHY THE PETITION SHOULD BE DENIED 7

I. Defendants' Feigned Confusion Over The *Bose* Rule Of "Independent Appellate Review" Is Neither Shared By Federal Or State Courts Nor Relevant To The Issue Of "Substantial Truth" In The Context Of This Case 7

A. *Bose*'s Mandate Of Independent Appellate Review Of The Issue Of Actual Malice Is Of No Moment To The Instant Issue Of "Substantial Truth" 7

B. The Cases Cited By Defendants Evidence An Absence Of Judicial Conflict, And Are Neither Relevant To The Analysis Of Substantial Truth In This Case Nor In Contravention Of This Court's Precedent 13

II. That Plaintiff's Status As A Private Figure Is Soundly Supported In Fact And Law Over Which There Is No Conflict Between the Courts 16

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bose Corp. v. Consumer's Union, 466 U.S. 485 (1984) ..... *passim*

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 18, 20

Connaughton v. Harte-Hanks Communications, Inc., 491 U.S. 657 (1989) 11, 12, 13

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 17

Deaver v. Hinel, 391 N.W.2d 128 (Neb. 1986) 15

Fiske v. Kansas, 274 U.S. 380 (1927) 10

Gertz v. Welch, 418 U.S. 323 (1974) ..... *passim*

Girod v. El Dia, Inc., 668 F. Supp. 82 (1987) 21

Hoffman Co. v. E.I. Dupont de Nemours & Co., 202 Cal. App. 3d 390 (1988) 22, 23

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 17

Kaufman v. Fidelity Federal Savings & Loan, 140 Cal. App. 3d 913 (1983) 20

Locricchio v. Evening News Ass'n, 476 N.W.2d 112 (Mich. 1991) 14, 15

Lundell Mfg. Co. v. American Broadcasting Companies, 98 F.3d 351 (8th Cir. 1996) 13

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 12

New York Times v. Sullivan, 376 U.S. 254 (1964) .. 7, 8, 9, 10

Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244 (1984) 17

TABLE OF AUTHORITIES – Continued

Page

Rosanova v. Playboy Enter., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) 19

Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551 (E.D. Mich. 1979) 17

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 17, 21

Time, Inc. v. Pape, 401 U.S. 279 (1971) 10, 12

Velleiux v. NBC, 206 F.3d 92 (1st Cir. 2000) 14

Waldbaum v. Fairchild Publ'n, Inc., 627 F.2d 1287 (1980), *cert. denied*, 449 U.S. 898 (1980) 19, 21

Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) 17, 18, 21

OTHER AUTHORITIES

Robertson, *In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 1999 (1976) 17

L. Tribe, *American Constitutional Law*, 645 (1978) 18

INTRODUCTION

Defendants, by their Petition, seek to convert the specific constitutional shields afforded the press into a sword with which unfettered media conglomerates can slay the good name and reputation of anonymous persons. In an attempt to constitutionalize each and every element of defamation law, be it in cases involving public figures or private figures, malice or negligence, Defendants clearly confuse well-established principles of "falsity," "knowledge of falsity," and "fault." Defendants, in claiming appellate court conflict as to the review of "substantial truth," proceed from the incorrect premise that, in all cases, there is constitutional significance to this loosely defined phrase. In short, substantial truth does not equate to truth, does not eliminate fault and does nothing to encourage or censor an accurate and responsible press. As set forth in detail below, although truth and falsity are pertinent to constitutionally mandated elements of fault, in the instant matter, substantial truth is not. After two juries and two Appellate Opinions have concluded that Defendants had negligently and intentionally published false and defamatory statements and implications, and Defendants, having made testimonial admissions that they knew, prior to the time of publication, that the defamatory statements and implications were false, this case presents no conflict for this Court to resolve.

Similarly, there is no disagreement in lower courts concerning the issue of "limited purpose public figure." The diverse case findings reached through the application of well-established factors pertinent to this analysis result from the simple, subtle and cherished fact that our society is a blend of diverse individuals. The only tactic in

Defendants' arsenal against this fact is deception in an attempt to mislead this Court.

First, Defendants agreed that neither new law nor facts justified revisiting the limited purpose public figure issue in the second trial. App. 1-2. (References to Plaintiff's Opposition Appendix are herein referred to as "App." References to Defendants' Petition Appendix are herein referred to as "Def. App.")

Although finding Defendants had waived the public figure issue on appeal, the Court of Appeal, nevertheless, addressed the issue for the second time. Def. App. 14a-18a. Defendants again tried unsuccessfully to persuade the Court of Appeal to reverse its sound decision based on a single document that had been carefully scrutinized and analyzed in both Appellate Opinions. Def. App. 14a-16a. Likewise, Defendants' new claim – that Plaintiff was poised to "control" a bank – is without support in fact. In truth, prior to publication of the false and defamatory articles, Defendants had actual knowledge that Plaintiff had filed with the Federal Home Loan Bank Board ("FHLBB"), and the FHLBB had accepted, a Rebuttal of Rebuttable Presumption of Control, ensuring that Plaintiff would have *no control of any aspect of the bank's business operations or management*. What is equally preposterous is Defendants' belief that this single false fact, if true, could, in and of itself, trump the numerous factors relevant to the issue. As set forth below, Defendants' predicate assumption is without support in law.

Defendants' tortured public figure analysis would have this Court homogenize the wide-array of figures targeted by the media so as to provide it a perfect design to defame without liability. The trial and Appellate courts,

applying the clear principles of this Court relative to the public figure issue to this factual situation, reached identical conclusions – that Plaintiff is a private figure as a matter of law. As set forth below, the questions presented by Defendants' Petition present no constitutional issue sufficient to warrant review by this Court.

STATEMENT OF THE CASE

This defamation case arises from articles Defendants published on November 27, 1988 and February 28, 1989 concerning Plaintiff. Generally, after Plaintiff applied to increase his holdings in Financial Corporation of Santa Barbara ("FCSB"), which owned 100% of Santa Barbara Savings and Loan Association ("SBSLA"), Defendants published the false and defamatory statements and implication that Plaintiff was investigated for several federal felony offenses in connection with one of the most notorious white collar crimes of the 1970's.

On October 4, 1993, the first jury returned a verdict in Plaintiff's favor, in the sum of $5,000,000 for damages to reputation, plus $2,500,000 for emotional harm. On January 14, 1994, the first trial judge granted a motion for a new trial based upon an inconsistency in the verdict and its determination that the emotional harm award (not the reputation award) was excessive. The Court of Appeal for the Second District (Division Three), on March 24, 1997, upheld the trial court as to all matters, including the finding that Plaintiff was a private figure and that any concern was created by the newspaper articles, and did not suffice to convert the general subject of the banking industry into a public controversy. Def. App. 75a.

The matter was remanded for a new trial. On January 29, 2001, the case proceeded to a second jury trial before Judge Kalin. Defendants, at the end of Plaintiff's case, moved and were granted a directed verdict on the issue of constitutional malice. Def. App. 11a-12a. After granting said motion, the court instructed the jury not to award presumed damages based on the absence of malice. The jury returned a verdict of $2,000,000 in general reputation damages and $250,000 in mental distress on March 29, 2001. Def. App. 2a

The parties again appealed. On September 28, 2003, the Court of Appeal of the State of California, Second Appellate District, Division Three, affirmed Judge Kalin's verdict in all respects, confirming that the article concerned a "public matter" and rejecting Plaintiff's argument that the Court had erred as to the availability of presumed and punitive damages under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Def. App. 34a, 37a. On January 14, 2004, the California Supreme Court denied discretionary review of this case. Def. App. 55a.

MISSTATEMENTS AND OMISSIONS OF FACT AND LAW IN PETITION

1. Defendants' statement that "Later in 1988, Respondent and his then-wife applied to the California Department of Savings and Loan . . . for approval to increase their shares in SBSL from 9.9 to 24.9 percent – a level of ownership significant enough to automatically trigger a statutory presumption of control over the institution . . ." (Petition, p. 2-3) omits the obvious. Defendants

conveniently omit that Plaintiff had filed a Rebuttal of Rebuttable Presumption of Control with the FHLBB which had been approved by the FHLBB in September, 1988, more than two (2) months prior to the publishing of the first article. App. 3-10. Plaintiff was thus never in a position of control and was never an officer or director of the institution.

2. Defendants' statement that "Although Respondent eventually acknowledged that most of the articles' statements regarding his history of legal tribulations were true or otherwise non-actionable . . ." (Petition, p. 4) is inaccurate. In fact, Plaintiff made no such acknowledgment, and although Plaintiff only proceeded against Defendants as to four specific statements, as to the implication, such implication was expressed throughout many parts of both articles that were the subject of the instant case, and it was Plaintiff's specific claim that the implication, as well as the statements, were entirely false.

3. Defendants' statement that "[T]he court reasoned that even an influential businessman or a controlling shareholder of a regulated business must thrust himself into a public controversy in order to be a public figure to any extent . . ." (Petition, p. 5) has no application as to Plaintiff. This was not the Court's reasoning as to Plaintiff. Again, as stated above, Plaintiff was never a controlling shareholder of the regulated business.

4. Defendants' statement that "[C]onsequently, it was undisputed that the SEC's investigation of the frauds that ultimately sent Marlin to prison initially included Respondent . . ." (Petition, p. 7) is completely untrue. In fact, Plaintiff introduced a huge body of evidence, testimonial, as well as documentary, including seven government

witnesses (of which Green was one), all of which was heard, weighed and evaluated by the jury, and from which the jury did conclude that no such investigation at the SEC ever took place. This evidence submitted by Plaintiff negated the existence of any such investigation and the jury, in fact, found that no such investigation ever occurred, including at the SEC. Under no circumstances could it ever be asserted that such evidence was "undisputed." Def. App. 20a-26a.

5. Defendants' statement that "In fact, found [sic] the Court of Appeal's only rationale for finding the News-Press' evidence of substantial truth insufficient to defeat Respondent's claims was 'ambiguous' and 'conflicting inferences' could be drawn from it . . ." (Petition, p. 16) is utterly false. The Court of Appeal's opinion cites considerable exception with the basic aspects of the implication, as well as the statements, which argue conclusively, and not merely as to "ambiguous" and "conflicting inferences." Def. App. 20a-26a.

6. Defendants' statement that "While this Court's decision in Hutchinson confirms that taking a leading role in a public debate may be sufficient to establish public figure status . . ." (Petition, p. 22) is unrelated to the instant case, in which Plaintiff, as a shareholder at a shareholder meeting, not even a public debate, made a few brief comments, and nothing more. He never in any way took a "leading role in a public debate." There was no controversy.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Defendants' Feigned Confusion Over The *Bose* Rule Of "Independent Appellate Review" Is Neither Shared By Federal Or State Courts Nor Relevant To The Issue Of "Substantial Truth" In The Context Of This Case.

A. *Bose*'s Mandate Of Independent Appellate Review Of The Issue Of Actual Malice Is Of No Moment To The Instant Issue Of "Substantial Truth."

In *Bose Corp. v. Consumer's Union*, 466 U.S. 485 (1984), the alleged defamatory material in a public figure-malice case consisted of a statement in a magazine that the musical sound projected by Bose's speakers tended to wander "about the room." Plaintiff argued that the sound in fact tended to wander "along the wall" and introduced testimony to corroborate this latter interpretation. In approving the author's choice of words as a valid exercise of literary license, this Supreme Court held that judges in such cases have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose* at 514. Plaintiff's testimony at issue was that of the engineer who performed the evaluation for defendant in order to corroborate plaintiff's interpretation. *Id.* at 493-494. The testimony was offered as evidence of defendant's "*knowledge of this falsity.*" *Id.* at 494. (Emphasis added.) The Court, however, went on to state that:

> "There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan* and to which the clearly-erroneous standard

> [] is fully applicable. Indeed, it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual-malice question; rather only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a '*de novo*' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes the judgment should be entered for plaintiff. Although the Court of Appeals stated that it must perform a *de novo* review, it is plain that the Court of Appeals did not overturn the factual findings . . . , but instead engaged in an independent assessment only of the evidence germane to actual-malice determination."

Bose at 514 [citing *New York Times v. Sullivan,* 376 U.S. 254 (1964)]. In dissent, Justices Rehnquist and O'Connor precisely stated the thin thread of connection between substantial truth and actual malice:

> "The District Court concluded by what it found to be clear and convincing evidence that respondent's engineer [] had written the defamatory statement about Bose's product with actual knowledge that it was false. It reached that conclusion expressly relying on its determination about the credibility of [respondent's engineer]. [Citation omitted.] On appeal, there was no issue as to whether the district court properly understood what findings were legally sufficient to establish 'actual malice' nor was there any issue as to the necessary quantum of proof nor the proper allocation of the burden of proof

> of [actual malice]. The issue on appeal thus was only the propriety of the district court's actual conclusion that Bose had actually proved 'actual malice' in this case. Yet the Court of Appeals never rebutted the district court's conclusion that [respondent's engineer] had actual knowledge that what he printed was false. Instead, it concluded after *de novo* review that [respondent's engineer's] language was merely 'imprecise' and that as such, it would not support an inference of 'actual malice.'"

Bose at 516. The dissent went on to correlate the Court of Appeal's unclear correlation between "the *mens rea* conclusion necessary to the finding of 'actual malice' and the language used in the article." *Id.* The dissent went on to observe that:

> "The problem results from the court's attempt to treat what is here, and in other contexts always has been, a pure question of fact, as something more than a fact – a so-called 'constitutional fact.'"

Bose at 517. In dissent, Justice White, as well as Justices Rehnquist and O'Connor, observed that while the five Justices' Opinion:

> "[C]orrectly points out that in *New York Times Co. v. Sullivan*, we conducted independent appellate review of the facts underlying the 'actual malice' determination . . . *New York Times* came to this Court from a state court after a jury trial, and thus presented the strongest case for independent factfinding by this Court. The factfinding process engaged in by a jury rendering a general verdict is much less evident to the naked eye and thus more suspect than the factfinding

> process engaged in by a trial judge who makes written findings as here. Justifying independent review of facts found by a jury . . . it is not surprising . . . that early cases espousing the notion of independent appellate review of 'constitutional facts,' such as *Fiske v. Kansas*, 274 U.S. 380 (1927), and *New York Times*, should have arisen out of the context of jury verdicts and that they then were perhaps only reflexively applied in other quite different contexts without further analysis. See *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (involving appellate review of a District Court's directed verdict)."

Bose at 518-19. Consequently, although:

> "*[T]he issues of 'falsity' and 'actual malice' in this case may be close questions*, . . . the District Court, which heard the principal witness for the respondent testify for almost six days during the trial, fully understood both the applicable law and its role as a finder of fact. Because it is not clear . . . that the *de novo* findings of appellate courts, with only bare records before them, are likely to be any more reliable than the findings reached by trial judges, I cannot join the majority's sanctioning of factual second-guessing by appellate courts. . . . [T]he primary result of the Court's holding today will not be greater protection for First Amendment values, but rather only lessened confidence in the judgments of lower courts and more entirely factbound appeals."

Bose at 519-20. (Emphasis added).

Accordingly, *Bose*'s independent review mandate, under the unique circumstances in which testimony relevant to falsity was the only evidence upon which the actual malice determination rested, is irrelevant to the

instant case in which the jury specifically found the statements and implication to be false and defamatory, and negligently and intentionally published. In fact, although unnecessary in a negligence case, the jury and appellate court found Defendants to have known the statements and implication to be false. Here, the jury, was instructed that a "statement is not false if it is substantially true," and was instructed that Defendants are negligent if, among other things, they act unreasonably in determining the truth or falsity of such statements. Accordingly, the *Bose* connection between falsity and fault is irrelevant, and Defendants' belief that *Bose* even alludes to a constitutional mandate that the Court of Appeal independently review the issue of substantial truth in such cases completely unfounded.

Defendants' reliance on *Connaughton v. Harte-Hanks Communications, Inc.*, 491 U.S. 657 (1989), is equally misplaced. Defendants, conveniently citing the Sixth Circuit decision to support their claim of conflict necessitating this Court's review, ignore this Supreme Court's analysis in reconciling any perceived ambiguity. Again, in a public figure malice context, the issue of falsity on review pertained to the jury's findings as to defendants' awareness of falsity as it related to actual malice:

> "Certain statements in the Court of Appeals' opinion, when read in isolation, appear to indicate that the court at times substituted the professional standards rule for the actual malice requirement and at other times inferred actual malice from the newspaper's motive in publishing [the] story. Nevertheless, when the opinion is read as a whole, it is clear that the conclusion concerning the newspaper's departure from accepted standards and the evidence of motive

> were merely supportive of the court's ultimate conclusion that the record 'demonstrated a reckless disregard as to the truth or falsity of [defendant's] allegations and thus provided clear and convincing proof of 'actual malice' as found by the jury.' 842 F. 2d, at 847. Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence [citations omitted], and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry. Thus, we are satisfied that the Court of Appeals judged the case by the correct substantive standard."

Harte-Hanks, 491 U.S. at 667-68. Finally, in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), again involving a public figure malice case, this Court directly and expressly rejected Defendants' position here:

> "The Court of Appeals applied a test of substantial truth which, in exposition if not in application, comports with much of the above discussion. The Court of Appeals, however, went one step beyond protection of quotations that convey the meaning of a speaker's statement with substantial accuracy and concluded that an altered quotation is protected so long as it is a 'rational interpretation' of an actual statement, drawing this standard from our decisions in *Time, Inc.* and *Bose* [citations omitted]. Application of our protection for rational interpretation in this context finds no support in general principles of defamation law or in our First Amendment jurisprudence. Neither *Time, Inc. v. Pape* nor *Bose Corp.* involved the fabrication of quotations, or any analogous claim, and because many of the

> quotations at issue might reasonably be construed to state or imply factual assertions that are both false and defamatory, we cannot accept the reasoning of the Court of Appeals on this point."

Harte-Hanks at 518. In the subject case, the Court of Appeal after the first trial was unable to review the substantial truth issue due to the insufficiency of the record. Def. App. 72a. The court did, however, identify the distinction between malice/fault driven reviews of substantial truth and pure falsity concerns. Def. App. 69a-72a. Contrary to Defendants' claim, the Court of Appeal made clear that "when the underlying facts as to the gist and sting of a defamatory charge are [disputed], . . . sufficiency of evidence analysis applied in case brought by private plaintiff against media defendant." [Citing *Lundell Mfg. Co. v. American Broadcasting Companies*, 98 F.3d 351, 358-60 (8th Cir. 1996). Def. App. 70a-71a. After the second trial, the Court of Appeal was not confronted with a jury determination of falsity in connection with an award of malice. Moreover, a careful review of the Second Opinion, consistent with *Lundell*, reveals that, as in *Harte-Hanks,* the Court of Appeal did engage in an independent review to determine and discern between undisputed and disputed facts. Def. App. 20a-26a.

B. The Cases Cited By Defendants Evidence An Absence Of Judicial Conflict, And Are Neither Relevant To The Analysis Of Substantial Truth In This Case Nor In Contravention Of This Court's Precedent.

The cases Defendants cite as supportive of independent appellate review of the falsity element are inapposite

to the instant matter and consistent with this Supreme Court's mandates on the issue. In *Velleiux v. NBC,* 206 F.3d 92 (1st Cir. 2000), the court reversed the jury's finding that thirteen (13) statements were false and defamatory and published with actual malice. *Id.* at 107. Applying Maine's common law expansion of constitutional principles, the court noted that:

> "Following *Bose*, *this court* . . . of appeal, has extended the independent review rule. . . . We have stated that where the trial court is called upon to resolve a number of mixed fact/law matters which implicate core First Amendment concerns, our review, at least on these matters, is plenary. . . . Independent review is subject to limitations, however. First, a court of appeals will not conduct a plenary review of the entire record. The *Bose* Court limited the scope of the independent review. [*citing, Bose, supra* at 514 n. 31.]
>
> Second, the reviewing court does not extend the independent review standard to all determinations. . . . [Citations omitted.] Purely factual determinations . . . remain best addressed by the factfinder, and are subject to the usual, more deferential standard of review."

Velleiux at 107. Finding each and every statement to be either true or unverifiable opinion, the court held that plaintiffs did not meet their burden of falsity necessary to establish fault. *Id.* at 114.

In *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112 (Mich. 1991), the Court of Appeal was reversed for reinstating a malice jury verdict for plaintiff after the *trial court* ruled that the statements comprising the implication at issue were not false. The Court of Appeal did so *without*

any review whatsoever, ruling that its prior denial of defendants' summary judgment motion was law of the case. *Id.* at 114-15. The focus of the trial was on the reporter's belief in the truth or falsity of the report. *Id.* at 119. The court's focus on falsity was based on the fact that "actual malice . . . necessarily involves a threshold determination of falsity, since proof of actual malice requires proof of both falsity and reckless disregard of falsity." *Id.* at 124-25.

Here, Defendants' substantial truth defense had nothing to do with the reporter's state of mind at the time of publication, and, in fact, was supported solely by evidence conjured up by defense counsel after the lawsuit had been filed. Finally, in *Deaver v. Hinel*, 391 N.W.2d 128 (Neb. 1986), a public official-malice case, plaintiff failed to meet the threshold burden of falsity by the requisite clear and convincing standard. *Id.* at 535, 540. In sum, the cases cited by Defendants do not engage in independent review of falsity unless critical to a determination of malice or state of mind.

There is no constitutional value in false statements of fact. However, States may not impose liability without fault. It is only in the analysis of the latter that the former gains the constitutional importance warranting independent review. Substantial truth is neither concerned with the breathing space to be afforded a free press nor the level of culpability at which that space gives way to individual reputation. It is merely a post-publication defense to stretch the truth; not a constitutional requirement.

II. That Plaintiff's Status As A Private Figure Is Soundly Supported In Fact And Law Over Which There Is No Conflict Between the Courts.

The Court of Appeal's decision below is not a departure from this Court's precedent nor do the cases reflect any disagreement in lower courts on the public figure issue. The cases cited by Defendants in their Petition neither evidence any conflict nor undermine the Court of Appeal's ruling in the instant case. Defendants do not cite a single case in which a passive investor in a business, holding no position as officer or director thereof, is deemed a limited purpose public figure by such marginal involvement. The cases cited by Defendants involve individuals who own and/or control high-profile companies. In sum, Plaintiff is not a limited purpose public figure.

The *only* fact Defendants raise in an attempt to analogize Plaintiff to a plaintiff that could be deemed to be a limited purpose public figure is based on a misrepresentation of Plaintiff's California Department of Savings and Loan ("CDSL") application. Contrary to Defendants' claim that Plaintiff, by his application, was to control Santa Barbara Savings and Loan, the true state of the facts is that through filing the Rebuttal of Rebuttable Presumption of Control, any control of Santa Barbara Savings and Loan by Plaintiff was specifically and absolutely negated. App. 3-10.

Although Defendants ignored this fact as a pretext for publishing the false and defamatory articles, the law is clear that Defendants cannot by their own conduct make Plaintiff a limited purpose public figure. A defamation defendant cannot create a defense by creating a controversy from the content of defamatory statements.

(*Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). A plaintiff does not become a public figure simply by responding to defamatory statements (*Time, Inc. v. Firestone*, 424 U.S. 448, 454-455, fn. 3 (1976)).

Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 252 (1984), reciting this Court's precedent made clear that:

> "[W]hen called upon to make a determination of public figure status, courts should look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies. As reflected in the evolution of the public figure doctrine, from *Butts* through *Gertz*, *Firestone* and *Wolston*, such a determination is often a close question which can only be resolved by considering the totality of the circumstances which compromise each individual controversy."

Id. at 255 [citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Welch*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, *supra*, and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979)].

In *Gertz*, this Court ruled that Mr. Gertz was not a limited purpose public figure despite having, among other things, authored four books and "thousands" of articles in legal, historical and literary publications, having been the subject of forty articles in Chicago newspapers, and having had made many television and radio appearances. *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 558 (E.D. Mich. 1979), *quoting* from Robertson, *In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 1999, 222 (1976).

Moreover, merely being associated "with a matter that attracts public attention," absent any attempt to engage the attention of the public to influence the resolution of issues involved, was no basis whatsoever for concluding that petitioner relinquished, to any degree, his interest in the protection of his name. *Wolston*, 443 U.S. at 169.

Although few generalizations can safely be promulgated, a review of *Gertz* and post-*Gertz* cases seems to warrant the comment of one scholar that:

> "A fairly high threshold of public activity is evidently necessary for a finding that a person has voluntarily plunged into a public controversy."

L. Tribe, *American Constitutional Law*, 645 (1978). "[T]he detailed, fact-sensitive nature of the precedent indicates that particularized determinations of public figure status are the rule." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980).

To determine whether a controversy indeed existed and, if so, to define its contours, the trial judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment. It should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy. Here, it is not.

Not everyone who participates in activities that affect the public becomes a public figure. *Waldbaum v. Fairchild Publ'n, Inc.*, 627 F.2d 1287, 1300, *cert. denied*, 449 U.S. 898 (1980). As numerously concluded by the trial court, the Appellate Court below, there was no public controversy at issue in the instant case and thus nothing for Plaintiff to voluntarily thrust himself into.

Moreover, the first trial and the appellate court in the instant case both concluded that, even, assuming *arguendo*, that a public controversy existed, Plaintiff did nothing to voluntarily seek to influence the resolution of any public issue involved. As previously determined, Plaintiff did nothing to shape the outcome of any specific public controversy, and thus remained a private figure for defamation purposes. Plaintiff did not have any role in any controversy sufficient to rise to the level required to make him a limited purpose public figure.

Once the court has defined the controversy, it must analyze the plaintiff's role in it. Trivial or tangential participation is not enough. The language of *Gertz* is clear that plaintiffs must have "thrust themselves to the forefront" of the controversies so as to become factors in their ultimate resolution. 418 U.S. at 345. They must have achieved a "special prominence" in the debate. *Id.* at 351. The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution. In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements. *Rosanova v. Playboy Enter., Inc.*,

411 F. Supp. 440, 445 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

In *Kaufman v. Fidelity Federal Savings & Loan*, 140 Cal. App. 3d 913, 921 (1983), the court, citing *Gertz*, made clear that:

> "'[T]he instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event they invite attention and comment.' Plaintiff, by voluntarily injecting himself into [a] . . . dispute, must accept the necessary consequences of that involvement in public affairs."

Here, the Court of Appeal clearly and concisely ruled that "Ross did not thrust himself into any . . . public controversy."

In *Bruno & Stillman*, the First Circuit, consistent with the Court of Appeal below, found that, "the record reveals no public controversy antedating the publication of the [defamatory] articles." *Id.* at 591. In *Bruno & Stillman*, the plaintiff determined to be a private figure was the largest builder of fishing boats in New England. The articles reported on the safety of such boats and a number of owners' concerns therewith. In determining that no public controversy preceded the articles, the First Circuit found that:

> "[W]e know little or nothing of ongoing private controversies, not to mention public ones. This case is to be contrasted with one where 'persons actually were discussing some specific question . . . (and) a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution.' *Waldbaum v. Fairchild Publ'n, Inc., supra*, 627 F.2d at 1297."

Publicity does not by itself elevate the parties to public figures, even if they could anticipate the publicity, unless they are using the court as a forum for espousing their views in other controversies. *Wolston, supra, at* 167-69; *Time, Inc. v. Firestone, supra*, at 455-57.

Defendants' citation to the District of Puerto Rico decision of *Girod v. El Dia, Inc.*, 668 F. Supp. 82 (1987), does not support their claim of conflict in the treatment of business figures. There, citing *Waldbaum, supra,* the court held that "being an influential businessman and tycoon does not by itself make plaintiff a public figure." *Girod*, 668 F. Supp. at 85. "However, when the entrepreneur exhibits an active and public ostentation of his role within the business and banking community, as well as the social and political spheres, he becomes, *under those circumstances*, a public figure." *Id.* The *Girod* court's decision turned on the fact that "the financial health of the trust company was a public issue, since the fate of the Girod Trust Company as a commercial banking institution in a small island community, involved and affected the property of many persons other than Alberic Girod." *Id.*

Here, the first trial court and the Appellate Court determined that no "matter of broad public interest" existed as to Plaintiff's "involvement with the bank and

his desire to purchase an additional interest in the bank." Def. App. 75a.

Girod is consistent with *Hoffman Co. v. E.I. Dupont de Nemours & Co.*, 202 Cal. App. 3d 390 (1988). In *Hoffman*, the plaintiff was a land developer who not only sought to build a housing project next to a chemical plant, but had also made political contributions to influence county officials who made the land use decisions. In holding plaintiff to be a limited purpose figure under the extreme circumstances unique to the case before it, the *Hoffman* court made clear that:

> "We do not mean to suggest that all speech relating to governmental affairs is automatically entitled to the highest level of constitutional protection, or to any protection. It is possible to conceive of speech concerning aspects of government that do not genuinely implicate any broad public interest nor materially enhance the self-governing ability of the public. However, as we have pointed out, the speech comprising the intentional tort alleged in this case does not relate to the conduct of low level civil servants regarding a matter of concern to few, but the exercise of power by elected officials on a matter of broad public interest. [Citations omitted.]"

Citing *Gertz*, the *Hoffman* court's secondary focus was on the fact appellant enjoyed "'access to the channels of effective communication' regarding the dispute and thus had a 'realistic opportunity to counteract false statements'." *Hoffman*, *supra*, at 405. Here, Defendants have proffered no evidence, disputed or otherwise, that Plaintiff had enjoyed "access to the channels of effective communication" so critical in *Gertz*.

The fact-sensitive analysis of the public controversy prong of the limited public figure analysis was set forth in *Hoffman* as being determined:

> "'[B]y the [expression's] content, form and context . . . revealed by the whole record'. [Citation omitted.] In the context in which it appeared, the speech with which we are here concerned pertained to two interrelated issues: most directly, the wisdom of the decision to permit construction of a housing development near a toxic chemical plant, and, indirectly, the manner in which political contributions from developers may have influenced the county officials who made the land use decision."

Hoffman, *supra*, at 406.

In the instant case, Defendants cannot point to a scintilla of evidence at the trial court level or the Court of Appeal below upon which this Supreme Court could question the limited public figure ruling herein. There was no "public controversy." Moreover, Plaintiff did not voluntarily thrust himself into any public issue whatsoever.

As set forth above, the Court of Appeal's conclusion on the limited public figure issue is soundly supported in this Court's precedent and consistent with federal and state courts.

CONCLUSION

For all of the reasons set forth above, Plaintiff respectfully submits that Defendants' Petition raises no issue for Supreme Court review.

Dated: April, 2004

Respectfully submitted,

LEONARD M. ROSS
1011 ½ North Beverly Drive
Beverly Hills, California 90210
(310) 278-8193
Respondent

Davis Wright Tremaine LLP **[LOGO]**

[Names And Addresses Omitted In Printing]

February 17, 2000

VIA FACSIMILE
Adam S. Bram, Esq.
Law Offices of Adam Scott Bram
1011½ North Beverly Drive
Beverly Hills, CA 90210

RE Ross v. Santa Barbara News Press

Dear Adam

As a follow-up to our discussion on February 7, 2000 concerning *in limine* motions plaintiff intends to pursue, we can represent the following on behalf of the defendants. First, defendants do not intend to call Barry Marlin, Al Ross or Lynn Stites as trial witnesses. I believe this renders four of twenty-two *in limine* motions unnecessary. In addition, defendants will not argue at trial that plaintiff is not a "private figure." This may make one other motion you were planning on filing unnecessary.

If you have any questions about these matters, please do not hesitate to call me or Gary Bostwick. We are still awaiting your response to the stipulations that were sent to you yesterday regarding potential agreement on three of defendants' *in limine* motions. We look forward to hearing from you. If you can not reach us at the office, please try my cell phone – [Phone Number Omitted].

Sincerely,

/s/ Karen Frederiksen
Karen N. Frederiksen
Davis Wright Tremaine LLP

KNF/ca

cc Anthony Michael Glassman, Esq.
Ernest Chen, Esq.

AGREEMENT

REBUTTAL OF REBUTTABLE DETERMINATION OF CONTROL UNDER PART 574

I. WHEREAS:

A. Leonard M. Ross and Merri Jean Ross, husband and wife (jointly referred to as "Ross") are the owners of 604,200 shares (the "Shares") of the $1.00 par value Common Stock (the "Stock") of Financial Corporation of Santa Barbara ("FCSB"), a savings and loan holding company, which owns 100% of Santa Barbara Savings and Loan Association, a California chartered savings and loan association, San Diego, California ("the Association"), which Shares represent 9.9 percent of a class of "voting stock" of FCSB, as defined under the Federal Home Loan Bank Board's ("Board") Acquisitions of Control Regulations ("Regulations"), 12 C.F.R. Part 574 ("Voting Stock");

B. FCSB and the Association are "insured institutions" within the meaning of the Regulations;

C. Ross may seek to acquire additional shares of Stock of FCSB ("Additional Shares"), such that Ross' ownership thereof will exceed 10 percent of a class of Voting Stock but will not exceed 25 percent of a class of Voting Stock of FCSB (the "Purchase");

D. Ross does not seek to acquire the Additional Shares for the purpose or effect of changing the control of FCSB or in connection with or as a participant in any transaction having such purpose or effect;

E. The Regulations, subject to certain exceptions, require a company or a person who intends to hold 10 percent or more but not in excess of 25 percent

of any class of Voting Stock of an insured institution or holding company thereof and that also would possess any of the control factors specified in the Regulations, to file and obtain approval of an application ("Application") under the Savings and Loan Holding Company Act ("Holding Company Act"), 12 U.S.C. Section 1730a, or file and obtain clearance of a notice ("Notice") under the Change in Savings and Loan Control Act of 1978 ("Control Act"), 12 U.S.C. Section 1730(q), prior to acquiring such amount of stock and a Control Factor unless the rebuttable determination of control has been rebutted;

F. Under the Regulations, Ross would be determined to be in control, subject to rebuttal, of FCSB upon the Purchase;

G. Ross has no intention to manage or control, directly or indirectly, FCSB;

H. Ross has filed on August 18, 1988, a written statement, as may be amended from time to time, seeking to rebut the presumption of control which is incorporated by reference herein, (this submission referred to as the "Rebuttal");

I. In order to rebut the rebuttable determination of control, Ross agrees to offer this Agreement as evidence that the acquisition of Additional Shares as proposed would not constitute an acquisition of control under the Regulations.

II. The FSLIC has determined, and hereby agrees, to act favorably on the Rebuttal, and in consideration of an FSLIC determination and agreement to act favorably on the Rebuttal, Ross and any other existing, resulting or successor of Ross agree with the FSLIC that:

A. Unless Ross shall have filed a Notice under the Control Act, or an Application under the Holding Company Act, as appropriate, and either shall have obtained approval of the Application or clearance of the Notice in accordance with the Regulations, Ross will not, except as expressly permitted otherwise herein or pursuant to any amendment to this Rebuttal Agreement:

1. Seek or accept representation of more than one member of the board of directors of FCSB;

2. Have or seek to have any representative serve as the chairman of the board of directors, or chairman of an executive or similar committee of FCSB's board of directors or as president or chief executive officer of FCSB;

3. Engage in any intercompany transaction with FCSB or FCSB's affiliates;

4. Propose a director in opposition to nominees proposed by the management of FCSB for the board of directors of FCSB other than as permitted in paragraph #1 above;

5. Solicit proxies or participate in any solicitation of proxies with respect to any matter presented to the stockholders of FCSB other than in support of, or in opposition to a solicitation conducted on behalf of management of FCSB;

6. Do any of the following, except as necessary solely in connection with performance of duties as a member of FCSB's board of directors:

(a) Influence or attempt to influence in any respect the loan and credit decisions or policies of FCSB, the pricing of services, any personnel decisions, the location of any offices, branching, the hours of operation or similar activities of FCSB;

(b) Influence or attempt to influence the dividend policies and practices of FCSB or any decisions or policies of FCSB as to the offering or exchange of any securities;

(c) Seek to amend, or otherwise take action to change, the bylaws, articles of incorporation, or charter of FCSB;

(d) Exercise, or attempt to exercise, directly or indirectly, control or a controlling influence over the management, policies or business operations of FCSB; or

(e) Seek or accept access to any non-public information concerning FCSB.

B. Ross is not a party to any agreement with FCSB.

C. Ross shall not assist, aid or abet any of the FCSB's affiliates or associates that are not parties to this Agreement to act, or act in concert with any person or company, in a manner which is inconsistent with the terms hereof or which constitutes an attempt to evade the requirements of this Agreement.

D. Any amendment to this Agreement shall only be proposed in connection with an amended rebuttal filed by Ross with the FSLIC for its determination or a determination pursuant to delegated authority;

E. Prior to the acquisition of any shares of "Voting Stock" of FCSB as defined in the Regulations in excess of the Additional Shares, any required filings will be made by Ross under the Control Act or the Holding Company Act, as appropriate, and either approval of the acquisition under the Holding Company Act shall be obtained from the FSLIC or any Notice filed under the Control Act shall be cleared in accordance with the Regulations;

F. At any time during which 10 percent or more of any class of Voting Stock of FCSB is owned or controlled by Ross, no action which is inconsistent with the provisions of this Agreement shall be taken by Ross until Ross files and either obtains from the FSLIC a favorable determination with respect to either an amended rebuttal, approval of an Application under the Holding Company Act, or clearance of a Notice under the Control Act, in accordance with the Regulations;

G. Where any amended rebuttal filed by Ross is denied or disapproved, Ross shall take no action which is inconsistent with the terms of this Agreement, except after either (1) reducing the amount of shares of Voting Stock of FCSB owned or controlled by Ross to an amount under 10 percent of such class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations; or (2) filing an application under the Holding Company Act or, a Notice

under the Control Act, as appropriate and either obtaining approval of the Application or clearance of the Notice, in accordance with the Regulations;

H. Where an Application or Notice filed by Ross is disapproved, Ross shall take no action which is inconsistent with the terms of this Agreement, except after reducing the amount of shares of Voting Stock of FCSB owned or controlled by Ross to an amount under 10 percent of any class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

I. Should circumstances beyond Ross' control result in Ross being placed in a position to direct the management or policies of FCSB then Ross shall either (1) promptly file an Application under the Holding Company Act, or a Notice under the Control Act, as appropriate, and take no affirmative steps to enlarge that control pending either a final determination with respect to the Application or Notice, or (2) promptly reduce the amount of shares of FCSB Voting Stock owned or controlled by Ross to an amount under 10 percent of any class of Voting Stock or immediately cease any actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

J. By entering into this Agreement and by offering it for reliance in reaching a decision on the request to rebut the presumption of control under the Regulations, as long as 10 percent or more of any class of Voting Stock of FCSB is owned or controlled, directly or indirectly, by Ross, and Ross possesses any Control Factor as defined in the Regulations, Ross will submit to the jurisdiction of the Regulations, including, (1) the filing of an amended rebuttal or Application or Notice,

as appropriate, for any proposed action which is prohibited by this Agreement, and (2) the provisions relating to a penalty for any person who willfully violates the Control Act and the Regulations thereunder, and any regulation or order issued by the FSLIC, as applicable;

K. Any violation of this Agreement shall be deemed to be a violation of the Control Act and the Regulations, if applicable, and shall be subject to such remedies and procedures as are provided in the Control Act and the Regulations for a violation thereof, and in addition shall be subject to any such additional remedies and procedures as are provided under any other applicable statutes or regulations for a violation, willful or otherwise, of any agreement entered into with the FSLIC.

III. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which counterparts collectively shall constitute one instrument representing the Agreement among the parties thereto. It shall not be necessary that any one counterpart be signed by all of the parties hereto as long as each of the parties has signed at least one counterpart.

IV. This Agreement shall be interpreted in a manner consistent with the provisions of the Rules and Regulations of the Board.

V. This Agreement shall terminate upon: (i) the approval by the Board of Ross' Application under the Holding Company Act or clearance by the Board of Ross' Notice under the Control Act to acquire FCSB and consummation of the transaction as described in such Application or Notice, or (ii) the disposition by Ross of a sufficient number of shares of FCSB or the taking of such other action so that thereafter Ross is

not in control and would not be determined to be in control of FCSB under the Control Act, the Holding Company Act or the Regulations of the Board under either in effect at that time.

VI. IN WITNESS THEREOF, the parties thereto have executed this Agreement by their duly authorized officer.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

Date: _____ By: _____
Principal Supervisory Agent

L. M. Ross
Leonard M. Ross

Merri Jean Ross
Merri Jean Ross

Sworn before me and witness my hand and notarial seal this 16th day of August, 1988.

Helen E. Mays
Notary Public

My commission expires: Sept. 29, 1990

[SEAL]